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No.

IN THE
Supreme Court of the United States

October Term, 1982

CAFFALL BROS. FOREST PRODUCTS, INC.,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. In a procurement contract process of national application, can the United states Forest Service avoid the constitutional obligation to pay just compensation for the cost of construction of permanent national forest system roads, which a timber purchaser is required to build as a part of a timber sale contract, by failing to designate a sufficient quantity of timber to fully amortize credits earned by constructing the road against the purchase price of the timber?

2. Does the United States Forest Service deny timber purchasers due process of law and violate national public policy by administering a contracting process for the construction of permanent national forest system roads in a fashion that all contractors, except timber sale purchasers, will be paid in full at the agreed upon contract price for road construction?

3. Should this Court issue a Writ of Certiorari in order to review and correct inconsistent and conflicting decisions of the United States Court of Claims relating to the construction and application of adhesionary United States Forest Service timber sale contracts which are used in the sale of all national forest timber?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
I. Opinion Below	1
II. Jurisdiction	2
III. Statutes Involved	2
IV. Statement of the Case	3
V. Reasons for Granting the Writ	7
A. Unless Reversed, the Decision Below Deprives the Petitioner of the Right to Compensation for Road Construction Established Under the Skogi Timber Sale Contract With Just Compensation, In Violation of the Fifth Amendment to the United States Constitution	7
B. Public Policy Requires Full Payment for Public Works Projects	10
C. The Decision of the Court Below Produces an Unconscionable Result	12
D. If This Decision of the Court of Claims Is Not Reversed, Its Direct Contradiction of Prior Indistinguishable Decisions of That Court Will Be Perpetuated	13
V. Conclusion	18

Appendices

Appendix A—Court of Claims Opinion	A-1
Appendix B—Findings of Fact	B-1
Appendix C—16 USC §§ 475, 476, 535	C-1

Page

Appendix D—36 CFR § 221.7 ..... D-1

Appendix E—FSM 2431.23 ..... E-1

Appendix F—UCC § 2-302 ..... F-1

TABLE OF AUTHORITIES

Table of Cases

Armstong v. United States, 364 U.S. 40 (1960) 9

Clearwater Forest Industries, Inc. v. United States, ___ Ct. Cl. ___, 650 F.2d 233 (No. 509-76, Slip Opinion May 6, 1981) 7,10,17,18

Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1964) 15

Everett Plywood Corporation v. United States, ___ Ct. Cl. ___, 651 F.2d 723 (No. 199-75, Slip Opinion dated May 20, 1981) 5,6,7,8,9,12

Everett Plywood & Door Corporation v. United States, 190 Ct. Cl. 80 (1969) ..... 7,10,12,14,15,*et seq.*

Fraas Surgical Manufacturing Co. v. United States, 215 Ct. Cl. 820, 571 F.2d 34 (1978) 13

Hollerbach v. United States, 233 U.S. 165 (1914) ... 13

Lynch v. Unites States, 292 U.S. 571 (1934) 7,9

McGrew Bros. Sawmills, Inc. v. United States, Ct. Cl. No. 43-78, (Order dated July 18, 1980 denying Cross Motions for Summary Judgment) 6

Miller v. Howe Sound Mining Company, 77 F.2d 540 (E.D. Wash. 1948) 9

Paccon, Inc. v. United States, 185 Ct. Cl. 24 (1968) ... 15

Peter Kiewit & Sons Company v. United States, 74 F. Supp. 165 (Ct. Cl. 1947) 6,10

	Page
Rixon Electronics, Inc. v. United States, 210 Ct. Cl. 309 (1976)	13
Russell & Pugh Lumber v. United States, 254 Ct. Cl. 122 (1961)	17
Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969)	7,9
Timber Investors, Inc. v. United States, 218 Ct. Cl. 408 (1978)	6,8,16
United States v. Northern Pacific R.R., 256 U.S. 51 (1921)	10
United States v. Sponenbarger, 308 U.S. 256 (1939	9
Womack v. United States, 182 Ct. Cl. 139 (1968)	15

Constitutional Provisions

U.S. Const. Amend. V	5,7,8,9,10,14

Statutes

36 CFR Part 221	2
36 CFR § 221.7	3,14
36 CFR 223.4	3
36 CFR § 223.5(e)(5)	13
16 U.S.C. § 472a	2,3
16 U.S.C. § 472a(i)	11,12
16 U.S.C. § 475	2
16 U.S.C. § 476	2,3
16 U.S.C. § 535	2,3,10,11,12,13, *et seq.*
16 U.S.C. § 535(1)	11
16 U.S.C. § 535(2)	11
23 U.S.C. § 205	11
28 U.S.C. § 1255(1)	2

Other Authority

	Page
Uniform Commercial Code § 2-313(1)(a)	16
Uniform Commercial Code § 3-302	12
United States Court of Claims Rule 134(h)	1-2

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Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Caffall Bros. Forest Products, Inc., prays for a Writ of Certiorari to review the decision of the United States Court of Claims entered in this case. At all times pertinent to this case, there was no parent or subsidiary corporations or other entities affiliated with or controlled by petitioner.

OPINION BELOW

The opinion of the Court of Claims was rendered on May 5, 1982. It is set forth in Appendix A hereto. The Trial Judge's Report, containing findings of fact, conclusions of law and a recommended decision was rendered on March 21, 1981 pursuant to United States Court of Claims Rule 134(h). The Court of Claims adopted this decision as the basis for its judgment on May 5, 1982. The Findings of Fact are set forth herein in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATUTES INVOLVED

This case involves the meaning and application of 16 U.S.C. §§ 475, 476 and 535. However, 16 U.S.C. § 476 was repealed in 1976 and replaced by 16 U.S.C. § 472a. Relevant Congressional policy regarding national forest timber sales has been consistent and remained relatively unchanged. The pertinent provisions of these statutes, together with Secretary of Agriculture's Regulations promulgated in 36 CFR Part 221 are set out in Appendices C and D to this Petition.

STATEMENT OF THE CASE

In order to carry out the congressional mandate that national forests are to be managed to provide a continuous supply of timber and other forest resources for the use and necessities of the citizens of the United States upon a sustained yield basis, the Secretary of Agriculture, acting through the Forest Service, is obliged to plan, construct and maintain a system of permanent roads within and near the national forests. Without access to the national forests, resources could not be protected and managed, timber harvest could not take place, and forest users would be deprived of a safe and reliable means of travel. Thus the development of roads is the most important means of access in the national forest system.

In 1964 Congress passed the National Forest Roads and Trails System Act (78 Stat. 1089, codified as 16 U.S.C. § 535). This act authorized the construction of permanent or system roads to be accomplished through the normal public works process and paid through appropriations. Another means authorized was by requiring purchasers of national forest timber, as part of the sale contract, to perform required road construction and be paid by crediting the cost thereof against

the purchase price of the timber. This system of "purchaser road credits" is a unique feature of Forest Service timber sale contracts. It permits a timber purchaser, by completing the required road construction, to earn credits to be applied against the price of the included timber limited to the amount specified by the Forest Service in the contract as the maximum credit limit. Thereafter, as the purchaser harvests and removes timber from the sale area, it must only pay a minimum or base rate in cash,[1] while the balance of the price is covered by established purchaser credits until they have been exhausted.

A precondition of all national forest timber sales is that the timber be appraised. The objective of the appraisal is to determine its fair market value. 36 CFR § 221.7, 16 U.S.C. § 476.[2] In all situations where purchasers are required to build the roads and purchaser credits are used to compensate them, this arrangement reduces the need for appropriated funds. The timber is valued by an appraisal and the minimum acceptable bid is established in the timber sale contract under the premise that all of the road construction had been performed and the roads are in place. Implicit in this arrangement is that minimum bids are based upon the enhanced value of the timber being offered for sale and a commitment by the Forest Service to provide a sufficient amount of timber to pay for the required road construction.[3] The timber volume estimate is a material part of the bid

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1. Usually $2 or $3 per MBF as currently required by 16 U.S.C. § 472a and implemented under 36 CFR § 223.3.

2. 16 U.S.C. § 476 was repealed in 1976 and replaced by 16 U.S.C. § 472a. 16 U.S.C. § 535 was amended at the same time. 36 CFR § 223.4 was promulgated to replace 36 CFR § 221.7. Insofar as the issues in this case, there is no change in the substance of the requirements of these laws and rules.

3. Whenever the value of the timber in a given sale is appraised to be insufficient to full amortize the cost of the required road construction the Forest Service practice is to put prospective bidders on specific notice of this fact and in most cases offering to offset the deficit by furnishing crushed rock or other construction materials in kind to offset the amount of the deficit.

solicitation and contract. Formal written Forest Service policy, in effect and applicable to the Skogi Sale is set forth in Appendix E hereto, which shows this beyond contradiction.

As road construction proceeds, the timber purchaser earns credits for the cost of work up to a maximum amount stated in the contract. As timber harvesting proceeds, earned credits are applied against the price for the timber in excess of stated minimum or base rates.

The capital investmant that a purchaser makes in constructing roads is essentially converted into credits. In effect, the Forest Service barters timber to pay the road construction costs.

This case involves a dispute arising out of the Skogi Timber Sale on the Mt. Hood Naticnal Forest in Oregon. The dispute centers around the estimated volume or quantity of timber which the Forest Service estimated or designated for sale, and against whose price the cost of required road construction would be offset. The Forest Service estimated that the Skogi timber sale area contained 13,300 thousand board feet (MBF) of merchantable timber. The contract established $264,764 as the purchaser credit limit for the specified construction and reconstruction of 4.85 miles of roads. This was to be offset against the timber whose appraised value in excess of base rates was $266,935.00. As a result of competitive bidding, petitioner bid the appraised value above base rates up to $307,000. Once road construction commenced, two necessary design changes were agreed to by petitioner and the forest service in order to make the road design fit the ground. These design changes increased the purchaser credit limit to $299,883, thereby requiring nearly 100 percent of the estimated timber volume to be recovered as a means of recouping the agreed upon compensation for road construction.

In due course, petitioner completed the required road construction and established the maximum purchaser credits allowed, $299,883. When all of the timber designated for cutting by the Forest Service had been removed, it was determined that there was a shortfall of 3,514 MBF which

meant that the petitioner was only able to apply $226,930 against the purchase price of timber. When the shortfall was discovered and quantified, the Forest Service was requested to designate additional timber for cutting sufficient to amortize the $72,953.00 in remaining road credits or conversely to pay compensation for the remaining cost of the roads and timber.

When the Forest Service refused to do either, petitioner brought this suit contending that it had been deprived of its property rights established under the Skogi Timber Sale Contract without just compensation, in violation of the Fifth Amendment to the United States Constitution, and that the Forest Service, under the circumstances, had warranted that the sale area contained a sufficient volume of timber to permit the full utilization of its earned purchaser road credits.

After the trial and an adverse Trial Judge's Report, the Court of Claims ruled that the Skogi Contract gave rise to no warranties as to the volume of timber included on the sale area or that there would be sufficient timber to permit the full utilization of earned purchaser credits. The court did not reach the constitutional issues, which were fully and fairly presented to it, but rather based its decision upon a narrow and strict construction of the contract, ignoring their prior decision in *Everett Plywood Corporation v. United States*, ____ Ct. Cl. ____, 651 F.2d 723 (No. 199-75, Slip Opinion dated May 20, 1981).

As a result of this Court of Claims decision, purchasers of national forest timber, who perform required road construction under contracts which appraise the timber at a value in excess of the cost of road construction, run the risk that they will not receive full compensation for road building, if the Forest Service by intention, inadvertence, or neglect, fails to include sufficient timber to amortize the road costs.

In the western states many purchasers, including petitioner, are dependent upon national forest timber as the exclusive or a principal supply source. Thus, the Forest Service in selling timber is exercising what amounts to monopoly power in a contracting process, which produces

contracts of adhesion. The only choices available to bidders respecting the terms of Forest Service contracts is the price bid for the timber or not to bid at all. Many purchasers, including petitioner, do not have the latter choice. They must purchase national forest timber or go out of business, since they are completely dependent on these lands for their timber.[4] On the other hand, all non-timber purchasers who build roads for the Forest Service are paid in full, thus discriminating against the timber purchaser road builders.[5]

The Court of Claims decision in this case is in conflict with several of its prior decisions, including: *Timber Investors, Inc. v. United States*, 218 Ct. Cl. 408 (1978), holding that whenever the Forest Service in its timber sale road construction contract process makes errors of costs or quantities which are unreasonably inaccurate, it amounts to a breach of contract, the responsibility for which cannot be effectively disclaimed; *Everett Plywood Corporation v. United States*, ___ Ct. Cl. ___, 651 F.2d 723 (1981), which held that national forest timber sale contracts, National Form 2400-5, the same used in this case, is a contract of adhesion and gives rise to vested property rights which may not be taken without the payment of just compensation; *McGrew Bros. Sawmills, Inc. v. United States*, Ct. Cl. No. 43-78, (Order dated July 18, 1980 denying Cross Motions for Summary Judgment), deciding that the language in Standard

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4. Any national forest timber sale policy, which could operate to cripple or destroy businesses that have been established to accomplish one of their prime goals, the continuous supply of timber for United states citizens, must be eliminated or corrected.

5. Any contractor building national forest system roads under a public works contract is assured of payment from appropriated funds. Any national forest timber purchaser who bids on a deficit sale is expressly warned prior to bidding that the timber does not have sufficient value to permit full recovery of road construction costs. However, any purchaser who bids on a sale with sufficient value must gamble that the indicated contract quantities of timber have been designated or run the risk of partial non-payment, thereby converting the contract to do a useful job for the government into a gambling transaction. *Peter Kiewit & Sons Company v. United States*, 74 F. Supp. 165 (Ct. Cl. 1947).

Clause B2.4 purporting to disclaim responsibility for errors in timber volume estimates was ambiguous as a matter of law;[6] *Everett Plywood & Door Corporation v. United States*, 190 Ct. Cl. 80 (1969), which found a warranty of volume under circumstances where insufficient timber had been included on the sale area to permit full recovery of road construction costs (but under a contract form which preceded the 2400-5); and *Clearwater Forest Industries, Inc. v. United States*, ___ Ct. Cl. ___, 650 F.2d 233 (No. 509-76, Slip Opinion May 6, 1981), wherein the court denied relief to a purchaser who bought a deficit sale and failed to recover all earned purchaser road credits.[7]

REASONS FOR GRANTING THE WRIT

A. Unless Reversed, the Decision Below Deprives the Petitioner of the Right to Compensation for Road Construction Established Under the Skogi Timber Sale Contract Without Just Compensation, In Violation of the Fifth Amendment to the United States Constitution

Unquestionably, government contracts create property rights that are protected from taking without compensation by the Fifth Amendment. *E.g. Lynch v. United States*, 292 U.S. 571 (1934); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969); and *Everett Plywood Corporation v. United States, supra.* Furthermore, the rights and

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6. This case was subsequently settled by the parties prior to trial, thereby precluding a decision on the merits.

7. It is interesting to note the dispute arose over the successor Forest Service National Timber Sale Contract Form 2400-6, which contained express language in Standard Provision B4.21, defining or limiting the extent to which earned purchaser credits could be effective, that is, applicable against the purchase price. Apparently the Forest Service developed this language out of recognition that the language in the 2400-5 version was inadequate and unclear. *Clearwater*, involving a deficit sale, is a case which can be limited to its facts. However, the question remains as to whether language in the 2400-6 contract form currently in use by the Forest Service can operate to defeat a purchaser's right to compensation for performed road construction, when the presale indications are that there is sufficient timber of a value to permit full utilization of earned road credits.

obligations of the United States under Forest Service Contracts such as the Skogi Sale must be predicated upon the fact that they are contracts of adhesion, which require a purchaser to build permanent roads per Forest Service design and location, but fix the compensation at the purchaser credit limit established by the Forest Service based upon their cost estimates. Routinely this credit limit is below the actual construction costs, further increasing the purchaser's financial burden of performance.

The entire Forest Service timber sale contracting process is based upon work performed by and exclusively within the control of the Forest Service, including the estimates of timber volume and quality, the timber appraisal, the purchaser credit limit for road construction, the road design and location, and the terms of the timber sale contract itself (*see* Appendix E). All of these are presented to prospective bidders on a take it or leave it basis. The bidders either choose not to bid, and beyond that can only control the amount bid. *Timber Investors, Inc. v. United States, supra* and *Everett Plywood Corporation v. United States, supra*. In the case at hand, the Forest Service agreed to pay petitioner $299,883 for road construction. The Forest Service failed to supply enough timber to amortize these credits and prevented petitioner from recovering $72,953 of earned road credits.

By failing to include or in refusing to add a sufficient volume of timber to pay for the required road construction, the Forest Service has breached constitutional, statutory, and contractual obligations owed petitioner. There is nothing within the applicable statute, agency regulations, or contract terms which indicate that unapplied purchaser credits will be forfeited, if the Forest Service fails to include sufficient timber in the sale. This forfeiture constitutes a taking of petitioner's contractual right to be paid for road construction, together with the benefits which would have been derived from the timber itself, without compensation, contrary to the Fifth Amendment to the United States Constitution. In this case petitoner in fact expended $326,000 to complete the required road construction. It seeks only compensation at the rates fixed in the contract but as a result of the decision

of the court below, petitioner is forced to bear a very substantial loss as a result of the Forest Service failure to designate sufficient timber to pay for the road construction. It has received the very substantial benefit of those services without paying for them.

The Fifth Amendment prohibition against the taking of private property for public use without just compensation is grounded on the concept of the injustice which can result from favoring the public against the owners of private property. *United States v. Sponenbarger*, 308 U.S. 256 (1939). The guarantee of the Fifth Amendment was designed to bar the United States from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole. *Armstong v. United States*, 364 U.S. 40 (1960). Within this concept falls property of many types including contract rights, whether under public or private contract. *Lynch v. United States, supra; Thorpe v. Housing Authority of Durham, supra; Everett Plywood Corporation v. United States, supra*; and *Miller v. Howe Sound Mining Company*, 77 F.2d 540 (E.D. Wash. 1948).

In this case, it is apparent from the contract that the Forest service intended petitioner to be fully paid for the road building since the timber was appraised to have more than sufficient value to do so. It was not the value estimate, but rather a shortfall in quantity, which prevented full payment.

The court below found that the estimates of timber quantity were of no legal consequence.[8] The Court of Claims committed serious error in so holding. The volume estimates as part of an appraisal are required by law. They are for the obvious benefit and protection of both the public and prospective bidders.

If the Skogi Contract is to be construed so as to allocate the risk of timber volume shortfall on petitioner, it should

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8. By statute and implementing regulation all national forest timber to be sold, must be appraised. The volume and quality estimates called "cruising," are an integral part of the appraisal, since the fair market value of the timber cannot be accurately determined unless the quantity of timber by species and grade is known.

be based upon plain, clear, conspicuous language, all of which are lacking in this case. In effect, the Court of Claims decision turns Forest service timber sale contracts into gambling transactions, in which the stakes are full payment for road construction. In order for the timber purchaser to win, the timber quantity estimate must be accurate, a matter which is within the exclusive control of the Forest Service. This is wrong. *Peter Kiewit & Sons Company v. United States, supra.*

This court in *United States v. Northern Pacific R.R.*, 256 U.S. 51 (1921) held that the railroad company's right to receive grant or indemnity lands, earned from construction of the railroad, were protected by the due process clause of the Fifth Amendment. The government could not thereafter cut down or extinguish those rights as a result of public lands being lost by homestead settlement without just compensation. This decision is instructive and parallel, since the government had full control over which lands were opened for homestead just as the Forest Service had full control over the size of the sale area and the amount of timber designated for sale.

B. Public Policy Requires Full Payment for Public Works Projects

Sound public policy respecting national procurement requires all persons building permanent roads in the national forest system to be treated equally, to receive full payment for road construction. Historically this has been true for the Forest Service since the 1950's. *Everett Plywood & Door Corporation v. United States, supra.* The case at hand involved a 2400-5 contract form, which was used from 1965 through 1970, when the 2400-6 form went into use.[9] The scope and application of the Court of Claims decision in *Clearwater Forest Industries, Inc. v. United States, supra*, which was a deficit sale under the 2400-6 form does not appear to authoritatively resolve the question presented in non-deficit sales.

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9. To the extent that contract language in the 2400-6 form and the 1975 amendment to 16 U.S.C. § 535 for the first time deals with "effective purchaser credits," it is submitted that the Act is unconstitutional since it permits the taking of property without compensation. However, that issue is not presented in this case.

In 1964 Congress enacted 16 U.S.C. § 535, which for the first time authorized a system of purchaser credits as a means of compensating purchasers for road construction required by timber sale contracts. There is no indication in this Act, its legislative history or the provisions of the 2400-5 contract to implement the Act, indicating that purchasers will not receive full payment for road construction through purchaser credits.[10]

This chain of events evidences clearcut public policy that timber sale purchasers should be paid in full for road construction. The National Forest Management Act, 16 U.S.C. § 472a(i), even went so far as to allow small business purchasers to avoid the risk of construction cost overruns, that is the difference between actual cost of building the roads and Forest Service road credit limit, by permitting them to elect to have the Forest Service perform the road construction.

Under the present state of affairs, as a result of the decision of the court below, national forest road contractors can be compensated in several ways: 16 U.S.C. § 535(1) allows contractors to be paid with appropriated funds; 23 U.S.C. § 205 permits road and trail funds to be used to pay for the cost of constructing and maintaining forest development roads; and as in petitioner's case, 16 U.S.C. § 535(2) allows provision for amortization of road building costs in contracts against the price of timber. The differences between full compensation with funds and potential non-payment because of unusable purchaser credits is unjustifiable. This unequal treatment of road contractors hinges solely on the type of federal contract entered into. The entitlement to receive full compensation in all road construction procurements for national forests must be on an equivalent basis or clearcut public policy is violated.

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10. As a matter of fact there appears to be nothing in 16 U.S.C. § 535 which restrained the Secretary of Agriculture or Forest Service from permitting the transfer of purchaser credits from one timber sale to another since the Forest Service treated those credits as equivalent to cash in a timber sale account. It was only the Forest Service refusal to transfer credits by rule-making or contract interpretation that led to the passage of the 1975 amendments to 16 U.S.C. § 535.

C. The Decision of the Court Below Produces an Unconscionable Result

Government contracts are governed by the general law of contracts, as determined by the federal courts. In recent times, the Uniform Commercial Code (now adopted by 49 states), has been applied as part of the body of law applicable to federal contracts, including Forest Service timber sales. *Everett Plywood & Door Corporation v. United States, supra; Everett Plywood Corporation v. United States, supra.* Uniform Commercial Code Section 2-302 permits a court to examine the facts surrounding contract formation and refuse to enforce all or portions of a contract, if it is unfair, unconscionable, or an oppressive result would otherwise obtain. (*See* Appendix F hereto.) The Official Comments to UCC § 2-302 states in part:

> This section is intended to allow the court to pass directly on the unconscionability of the contract or a particular clause therein and to make a conclusion of law as to its unconscionability. *The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of making the contract.* Subsection 2 makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (*Cf. Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948)) and not the disturbance of allocation of risk because of superior bargaining power. . . .

(Emphasis added).

In 1975 Congress amended 16 U.S.C. § 535 to permit purchasers to transfer earned road credits from one timber sale to another within the same national forest. This enables a purchaser to obtain full payment from completed road construction against the purchase price of other sales it is currently operating in the same national forest.

In 1976 Congress enacted the National Forest Management Act (90 Stat. 2949 as codified in 16 U.S.C. § 472a(i)) which permits small business bidders in all sales requiring the construction of permanent roads purchaser

credit in excess of $20,000, to opt as part of its bid to have the Forest Service perform the road construction. The Secretary of Agriculture has promulgated implementing regulations in 36 CFR § 223.5(e)(5).

If the Forest Service wished to prevent the petitioner and other bidders from attaching significance to the timber volume item in the bid solicitation and contract, it could easily have omitted the information. *Hollerbach v. United States*, 233 U.S. 165 (1914). Its failure to do so establishes the significance of the item.

The Forest Service timber sale contracting process produces a contract of adhesion. In the absence of clear and conspicuous language in the Skogi Sale Contract of adhesion, which fairly notes and allocates the risk of non-payment from volume shortfall to the purchaser, the Court of Claims decision below sanctions an unconscionable and oppressive result, one which should not be permitted. *Fraas Surgical Manufacturing Co. v. United States*, 215 Ct. Cl. 820, 571 F.2d 34 (1978); *Rixon Electronics, Inc. v. United States*, 210 Ct. Cl. 309 (1976).

D. If This Decision of the Court of Claims Is Not Reversed, Its Direct Contradiction of Prior Indistinguishable Decisions of That Court Will Be Perpetuated

In substance, the Court of Claims has ruled in this case:

1. That the obligation concerning full utilization of purchaser credits in the Skogi Contract is limited and conditioned upon the Forest Service correctly designating the indicated amount of timber for sale, notwithstanding the fact that the appraised value of the timber (which fixed the minimum bid) was determined upon the assumption that the roads had been built and its value enhanced accordingly.

2. That the estimates of timber quantity did not amount to an enforceable warranty.

16 U.S.C. § 535 authorizes the Forest Service acting under the Secretary of Agriculture to acquire, construct, and maintain forest development roads. Financing road

construction as allowed by utilization of appropriated funds; requirements on purchasers of national forest timber, including provisions for the amortization of road costs in contracts; by cooperative financing with other public and private agencies; or by a combination of the foregoing. Implicit with each of the financing approaches is the fact that the road builder will be paid in full. Otherwise purchasers would be burdened with paying part of the cost of public projects in violation of the Fifth Amendment.

It is clear from an historical prospective that the Forest Service has intended purchasers to be paid for road construction required under timber sale contracts under policies and practice in effect since the early 1950's. *Everett Plywood & Door Corporation v. United States, supra.* 16 U.S.C. § 535, as implemented by 36 CFR § 221.7, makes it clear that the policy and practice of full payment continue, but in a fashion that permits purchasers building roads to reap the economic benefit of their services at the time of completion of construction rather than spread out over the life of the timber sale contract.

The conclusion that all road builders were intended to be paid in full is inescapable because of the fact that the purchase price of the timber is invariably premised upon the assumption that the roads have already been build causing the timber values to appreciate accordingly. Thus, it was the clear intent as manifested by the purchase price of the timber that the Forest Service would pay in full for required road construction.

The Forest Service practice of making up deficits by furnishing construction materials and clearly warning the bidders that the timber values were appraised too low to permit full recovery of earned credits, is noteworthy.[11]

In Skogi, it was represented that the timber, both in terms of quantity and value, was sufficient to pay for the roads.

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11. It is only the monopoly position of the Forest Service and the dependency of bidders like petitioner that led to these deficit offerings being purchased. If they had a choice they would not absorb road costs.

The difference between the appraised timber values, as if the roads were in place and as though not yet built, is dramatic. The road in place appraised value was:

2,000 MBF Douglas fir at $23.75 =	$ 47,500
11,300 MBF Pacific silver fir at $21.95 =	$248,035
Total	$295,535

With road construction required of the purchasers and no purchaser credits (road costs part of logging costs) the timber would have been appraised at:

2,000 MBF Douglas fir at $3.85* =	$7,700
11,200 MBF Pacific silver fir at $2.05* =	$23,165
Total	$30,865

*Road costs were converted to MBF rate:
($264,764 divided by 13,300 = $19.90)
Appraised rates for Douglas fir becomes $23.75 - $19.90 = $3.85; Pacific silver fir becomes $21.95 - $19.90 = $2.05.

When the Court of Claims held that the estimates of volume or timber quantity in the Skogi Contract did not give rise to a warranty, it created a direct conflict with earlier decisions including *Womack v. United States*, 182 Ct. Cl. 139 (1968); *Dale Construction Co. v. United States*, 168 Ct Cl. 692 (1964); *Paccon, Inc. v. United States*, 185 Ct. Cl. 24 (1968); and *Everett Plywood & Door Corporation v. United States*, 190 Ct. Cl. 80 (1969). In *Womack*, the court stated on pages 412-413:

> An estimate as to a material matter in a bidding invitation is an expedient. Ordinarily, it is only used where there is a recognized need for guidance to bidders on a particular point but specific information is not reasonably available. *H.L. Yoh Co. v. United States*, 153 Ct. Cl. 104, 288 F.2d 493 (1961). Intrinsically, the estimate that is made in such circumstances must be the product of such relevant underlying information as is available to the author of the invitation. If the bidder were not entitled to so regard it its inclusion in the invitation would be surplusage at best, or a deception

> at worst. Assuming the bidder acts reasonably,[3] he is entitled to rely on government estimates as representing honest and informed conclusions. *Snyder-Lynch Motors, Inc. v. United States*, 154 Ct. Cl. 476, 292 F.2d 907 (1961).
>
> In short, in promulgating an estimate for bidding-invitation purposes, the government is not required to be clairvoyant, but it is obliged to base that estimate on all relevant information that is reasonably available to it.
>
> By adding a general variance in quantity provision to the bidding invitation for a fixed price contract the government does not dilute the standard to which it is held with respect to particular estimates that it includes eleswhere in the invitation.
>
> [3]. *Russell and Pugh Lumber Co. v. United States*, 154 Ct. Cl. 122, 290 F.2d 938 (1961).

(pp. 412-413).

The drafters of the Uniform Commercial Code provide in UCC § 2-313(1)(a):

> Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

The Court of Claims should have concluded that the statements of volume in the Skogi Contract amounted to warranties which obligated the United States to compensate petitioner for its breach.

The Court of Claims decision in this case is in direct conflict with *Everett Plywood & Door Corporation v. United States, supra*, wherein a warranty of volume was found to arise out of the timber volume estimates in a Forest Service contract. *Everett Plywood & Door* was predicated in part on the manifest intent of the Forest Service to pay for all of the road construction required of the purchaser.

In *Timber Investors, Inc. v. United States, supra*, the court ruled that a purchaser is entitled to rely upon statements of fact contained in a timber sale contract relating to the quantities and costs for work to be performed as a part of the road construction obligation, due to the unique feature in the Forest Service contracts which require a purchaser

to build the roads as designed for a fixed price that does not contain any allowance for profit and risk. The court went on to state that unreasonably inaccurate cost or quantity estimates are breaches of contract, the responsibility for which cannot be disclaimed.

If the decision at hand is permitted to stand, then national forest bidders are confronted with a "Catch 22." If the bidder relies upon the information contained in the sample contract and bid solicitation which are integral and material parts of the contract offering, he will be defeated by a murcky and unclear contract language even though the volume estimate proves to be unreasonably inaccurate. What is the purpose of those estimates if they are not be be considered by bidders? On the other hand, if the purchaser makes any independent investigation[12] then non-reliance upon the Forest Service estimates will be imputed, even though *Russell & Pugh Lumber v. United States*, 254 Ct. Cl. 122 (1961) requires bidders, when examining offerings and relying upon them, to act reasonably and prudently.

The Court of Claims cites *Russell & Pugh Lumber Co. v. United States, supra*, apparently as authority that volume estimates in public timber sale contracts are not warranties. That case is clearly distinguishable. It involved a lump sum price offering by the Bureau of Land Management in Oregon, which contained clear and explicit language requiring the purchaser to pay the full price regardless of the volume of timber recovered. It should also be noted that BLM contracts in Oregon usually do not require permanent roads to be built by purchasers.

The court's decision in *Clearwater Forest Industries v. United States, supra*, should be limited to its facts, that is applied only to "deficit sales," those advertised to contain

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12. In this case petitioner did not verify the timber volumes on the sale as a whole, but did make a reasonable effort to determine what portion of the Pacific silver fir was in fact Noble fir, the species difference.

insufficient *value* to permit recoupment of all or a portion of the road construction costs.[13]

It is clear that the volume estimates contained in the Skogi Contract are important and material parts of the contract.

The timber quantity estimate must be treated as a representation of fact which is a warranty, or the conflict between this case and the foregoing decisions is irreconcilable.

CONCLUSION

For each of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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13. It is interesting to note that the trial judge, Harry E. Wood, who wrote the original decision in *Clearwater Forest Industries, supra*, also wrote the decision adopted by the court in this case. The Court of Claims decision in *Clearwater* was filed on May 6, 1981, one year before the decision herein, and yet was not cited by the court.